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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 B.B. and V.B., parents of A.B,

11 Plaintiffs,

12 v.

13 TACOMA SCHOOL DISTRICT,

14 Defendant.
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Case No. 08-5512 RJB

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY
JUDGMENT AND
DENYING PLAINTIFFS'
CROSS-MOTION FOR
SUMMARY JUDGMENT

18 This matter comes before the court on Defendant's Motion to Dismiss (Dkt. 8), which the
19 Court on its own initiative converted to a Motion for Summary Judgment (Dkt. 13); and the
20 Plaintiffs' Cross-Motion to Dismiss (Dkt. 15). The court has considered the pleadings filed in
21 support of and in opposition to the motions and the remainder of the file herein.

22 **I. FACTUAL AND PROCEDURAL BACKGROUND**

23 On August 21, 2008, the Plaintiffs filed a complaint against the Tacoma School District
24 alleging denial of opportunity for an impartial due process hearing under the Individuals with
25 Disabilities Education Act ("IDEA"), 20 U.S.C. 1400 et seq.; the state Education for All Act,
26 Chapter 28A.13 RCW (Recodified as Chapter 28A.155 RCW pursuant to 1990 Wash. Sess. Laws
27 c 33 § 4.); and WAC 392-172A-05115. Dkt. 1. The Plaintiffs request (1) that this court assume
28 jurisdiction of this action; (2) reversal of the administrative court's denial of Plaintiffs' motion to

1 vacate dismissal of the Plaintiffs' complaint; (3) opportunity to present additional evidence; and
2 (4) costs, fees, and any further relief the court deems appropriate. Dkt. 1 at 12.

3 On October 30, 2008, the Defendant filed a motion to dismiss. Dkt. 8. Response and
4 reply were filed by the parties. Dkt. 9, 10. On November 28, 2008, the Plaintiffs filed a surreply.
5 Dkt. 11. On December 1, 2008, this Court converted Defendant's motion to dismiss to a motion
6 for summary judgment under Fed. R. Civ. P. 12(d). Dkt. 13. On December 12, 2008, Plaintiffs
7 filed a cross-motion for summary judgment. Dkt. 14.

8 A.B. is a 19-year-old boy who has autism. B.B. and V.B. are the parents of A.B. Dkt. 1
9 at ¶ 1.1, Dkt. 9 at 2. In April 2007, as A.B. was nearing the end of his senior year in high school
10 in the Tacoma School District ("District"), the parents retained attorney Randal Brown to help
11 them obtain transitional services for A.B. pursuant to IDEA. Dkt. 1 ¶ 3.4.

12 On May 8, 2007, the parents filed a due process complaint with the Washington State
13 Office of Administrative Hearings ("OAH") for the Office of the Superintendent of Public
14 Instruction ("OSPI"). Dkt. 9 at 3. The hearing was scheduled for January 14, 2008. Dkt. 1 at ¶
15 3.10, Dkt. 9 at 4. When the complaint was filed, the District agreed not to graduate A.B., or
16 issue him a diploma, in order to comply with the IDEA's "stay put" provision and to preserve
17 A.B.'s eligibility for special education. Dkt. 9 at 3.

18 The parties sought numerous continuances on the theory that the case would settle. Dkt.
19 9 at 3. On November 5, 2007, A.B.'s parents discussed possible settlement terms at a meeting
20 with Mr. Brown and counsel for the District, Jeffrey Ganson. *Id.* The next day, Mr. Ganson sent
21 an unsigned settlement offer to Mr. Brown. *Id.* A.B.'s parents rejected the District's settlement
22 offer. *Id.* Mr. Brown later sent to Mr. Ganson a counteroffer containing "minor" changes from
23 the District's offer. *Id.* One change concerned the reevaluation provider, who would be
24 "mutually agreed upon by the parties" instead of chosen solely by the District. Dkt. 9 at 3,4.

25 The parents allege that as the hearing date approached, Mr. Brown did not contact them
26 regarding the hearing and that Mr. Brown did not submit a witness list or take other steps
27 necessary to go to hearing. Dkt. 9 at 4. On January 10, 2008, the parents allege that they sought
28 alternate counsel, but they did not discharge Mr. Brown. Dkt. 1 at ¶ 3.11.

1 On January 14, 2008, Mr. Brown gave the parents a revised, unsigned agreement which
2 included the changes requested by the District. Dkt. 1 at ¶ 3.14. This revised settlement
3 agreement was never signed by the parents or the District. Dkt. 1 at ¶ 3.16. On the same day,
4 Mr. Brown moved for dismissal of Plaintiffs' hearing request with prejudice on the basis that the
5 parties would shortly execute a settlement agreement. Dkt. 9 at 4. The parents allege that they
6 never consented to dismissal with prejudice. *Id.*

7 On February 1, 2008, the motion for dismissal with prejudice was granted. The order
8 stated:

9 The Appellants/Parents submitted notice on January 14, 2008, that the parties have
10 successfully resolved their dispute and a hearing is no longer necessary. The
11 Appellants/Parties request that the due process hearing request, filed on May 8,
12 2007, be dismissed.

13 Dkt. 1 ¶ 3.22, Dkt. 9 at 5. At the time the order was granted, the parents believed that there was
14 no settlement agreement because the settlement was not signed. Dkt. 1 at 7. Additionally, the
15 parents contend that they never approved or ratified Mr. Brown's allegedly unauthorized request
16 for dismissal with prejudice. *Id.* The complaint alleges that within three weeks of receiving the
17 order of dismissal, the parents retained new counsel, Charlotte Cassady, to assess the
18 repercussions of the dismissal and options for moving forward. *Id.* The Plaintiffs state that they
19 were hampered by a lack of records and that Mr. Brown delayed production of his records to the
20 parents. Dkt. 9 at 5,6.

21 On July 17, 2008, the parents, with new counsel, filed with OAH a motion to vacate the
22 order of dismissal. Dkt. 9 at 6. The Defendant opposed that motion, arguing that motions to
23 vacate are not allowed under the rules governing an OAH hearing. Dkt. 9 at 7. On July 23,
24 2008, the OAH administrative law judge denied Plaintiffs' motion to vacate. Dkt. 9 at 7,8. The
25 order concluded, "The motion is not timely, and there appears no justification under CR 60, if
26 applicable, to set the voluntary Dismissal Order aside at this late date." Dkt. 9 at 8. Plaintiffs
27 then filed their Petition with this Court on August 21, 2008.

28 **II. DISCUSSION**

Defendant Tacoma School District now moves for summary judgment on the grounds of
failure to state a claim upon which relief may be granted. Plaintiffs cross-moved for summary

1 judgment arguing that the administrative law judge did have power to vacate and the Plaintiffs are
2 entitled to an impartial due process hearing.

3 **A. SUMMARY JUDGMENT STANDARD**

4 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
5 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
6 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
7 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
8 showing on an essential element of a claim in the case on which the nonmoving party has the
9 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
10 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
11 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
12 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
13 metaphysical doubt”). See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
14 material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring
15 a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 47
16 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630
17 (9th Cir. 1987).

18 The determination of the existence of a material fact is often a close question. The Court
19 must consider the substantive evidentiary burden that the nonmoving party must meet at trial -
20 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*
21 *Serv., Inc.* 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of
22 the nonmoving party only when the facts specifically attested by that party contradict facts
23 specifically attested by the moving party. The nonmoving party may not merely state that it will
24 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
25 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
26 Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be
27 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

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1 **B. INDIVIDUALS WITH THE DISABILITIES EDUCATION ACT (“IDEA”)**

2 The purpose of IDEA is to ensure that all children with disabilities have available to them
3 a free appropriate public education that meets their unique needs and prepares them for further
4 education, employment, and independent living. 20 U.S.C. § 1400(d). To protect that right,
5 IDEA allows the opportunity for any party to present a complaint with respect to any matter
6 relating to the identification, evaluation, or educational placement of the child, or the provision of
7 a free appropriate public education to such child. 20 U.S.C. § 1415(b)(6). Under IDEA, any
8 party aggrieved by the findings and decision made in a due process hearing, or a party who has
9 appealed a due process hearing’s findings and decision to a State educational agency, shall have
10 the right to bring a civil action and the action may be brought in any State court of competent
11 jurisdiction or in a district court of the United States, without regard to the amount in
12 controversy. 20 U.S.C. § 1415(i)(2)(A). The party bringing the action has 90 days from the date
13 of the decision of the hearing officer to bring such an action, or it must be brought in such time as
14 the State law allows. 20 U.S.C. § 1415(i)(2)(B). Washington State law states that “[t]he party
15 bringing the action shall have ninety days from the date of the decision of the administrative law
16 judge to file a civil action in federal or state court.” WAC 392-172A-05115. Additionally, under
17 Washington State’s Administrative Procedures Act, chapter 34.05 RCW, any party may file a
18 petition for reconsideration within ten days of the service of the hearing officer’s final order.
19 RCW 34.05.470(1).

20 The Plaintiffs’ due process hearing complaint was dismissed by the hearing officer on
21 February 1, 2008. The Plaintiffs filed their complaint with this Court on August 21, 2008, over
22 six months after the due process hearing complaint was dismissed. The IDEA and the related
23 Washington State law state that an action must be brought within 90 days of the date of the
24 decision of the hearing officer. The Plaintiffs’ complaint is clearly past the 90 day limitation
25 period in which to file an action in a district court of the United States. Therefore, the Plaintiffs
26 lost the right to bring a civil action in this Court.

27 However, in an attempt to resurrect their claim, the Plaintiffs’ filed a motion to vacate the
28 order of dismissal with the OAH on July 17, 2008. Defendant argues that the administrative law

1 judge lost jurisdiction due to the time limitations imposed by the Washington Administrative
2 Procedure Act (“WAPA”). WAPA states that “[w]ithin ten days of the service of a final order,
3 any party may file a petition for reconsideration.” RCW 34.05.470. Additionally, the Defendant
4 argues that the administrative law judge did not have the ability to hear the Plaintiffs’ motion to
5 vacate, and therefore the motion did not revive the action.

6 Plaintiffs responds that the motion invoked Superior Court Civil rule 60(b)(11) which
7 establishes the ability of the administrative law judge to vacate an order. Plaintiffs states that
8 WAPA “specifically provides that the administrative court ‘shall have the authority to... [r]ule
9 on... motions’ in an adjudicative proceeding, such as an IDEA due-process case[,]” under WAC
10 10-08-200(4). Dkt. 9 at 10. Additionally, the Plaintiffs assert that when the law does not
11 explicitly prohibit entertaining a motion, and does not purport to itemize every power of the
12 judge, the judge has authority to hear the motion, citing *Hall v. Seattle School District*, 66
13 Wn.App. 308, 314-15 (1992).

14 Defendant replies that no authority extends beyond the issuance of a final order at the
15 close of the hearing. Defendant asserts that upon a full reading of WAC 10-08-200(4), the
16 authority to “rule on procedural matters, objections, and motions” relates only to the prehearing
17 and hearing process, not post-decision matters. Defendant also argues that Plaintiffs’ attempt to
18 analogize the administrative hearing officer to a judge, with broad based inherent authority
19 ignores the limited legal authority possessed by administrative agencies such as OAH and OSPI.

20 The Court is not persuaded by the Plaintiffs’ argument. “The powers of an administrative
21 agency are derived from statutory authority expressly granted or necessarily implied.” *State ex*
22 *rel. Evergreen Freedom Foundation v. Wash. Educ. Assoc.*, 140 Wn.2d 615, 634 (2000).
23 Administrative agencies do not possess “inherent authority.” *Assoc. of Wash. Business v. Dep’t*
24 *of Revenue*, 155 Wn.2d 430, 445 (2005). “[W]here implied authority to grant or impose a
25 particular remedy is not clearly set forth in the statutory language or its broad implication, the
26 courts of this state have been reluctant to find such authority on the part of an agency.” *Skagit*
27 *Surveyors and Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998). This Court
28 researched the question of the ability of the administrative court in this case to hear a motion to

1 vacate and was not able to find express authority granting an administrative court the power to
2 hear a motion to vacate. Additionally, this Court has not found any implied authority granting the
3 power to hear a motion to vacate. Upon the full reading of WAC 10-08-200(4), the Court is
4 persuaded by Defendant's argument that "rule on procedural matters, objections, and motions"
5 relates only to the prehearing and hearing process. Finally, the Court is persuaded by the
6 Defendant's argument that the only authority granting an administrative law judge to consider a
7 motion to vacate is through RCW 34.05.470, which states a party must file a motion for
8 reconsideration within ten days of service of the final order.

9 It is clear that the Plaintiffs did not file a petition for reconsideration within the ten day
10 limitation period, and therefore the administrative law judge lost jurisdiction. Furthermore, since
11 the administrative law judge did not have the authority to hear the Plaintiffs' motion to vacate, the
12 action was not revived. In any event, assuming that the administrative law judge had authority to
13 act, the motion to vacate was denied, so the original order of dismissal was left intact. To rule
14 otherwise would be to allow any party to indefinitely delay the limitations periods by filing a
15 motion, or motions, to vacate. That does not appear to be within the intent of either federal or
16 state law and regulations.

17 Therefore, since the action was not revived, the action filed in this Court is not timely
18 because the complaint filed in this Court was more than 90 days after the February 1, 2008
19 dismissal by the hearing officer.

20 The Plaintiffs also argue that they were not afforded an opportunity for an impartial due
21 process hearing because the dismissal of their complaint was without their authority and that Mr.
22 Brown did not represent them. However, the administrative court, without knowledge of Mr.
23 Brown's lack of authority, had the right to rely on the representation of Mr. Brown. "[O]nce a
24 party has designated an attorney to represent him in regard to a particular matter, the court and
25 the other parties to an action are entitled to rely upon that authority until the client's decision to
26 terminate it has been brought to their attention." *Haller v. Wallis*, 89 Wn.2d 539, 547 (1978).
27 Even if the Plaintiffs' allegation that on January 10, 2008 they sought alternate counsel were true,
28 the administrative court did not know of that fact, and therefore acted properly in dismissing the

1 Plaintiffs' complaint. Additionally, the Plaintiffs knew of the dismissal of their complaint but did
2 not bring Mr. Brown's lack of authority to the attention of the administrative court within the ten
3 day or the 90 day limitation period. The Plaintiffs had an opportunity to bring notice to the
4 administrative court; they had an opportunity to file a motion for reconsideration ten days after
5 the decision; and they had an opportunity to timely file an appeal, and therefore the Plaintiffs'
6 argument fails.

7 This Court has no reason to, and does not herein address questions of Mr. Brown's
8 possible negligence and possible liability to Plaintiffs.

9 Finally, the Plaintiffs, within their response to Defendant's motion to dismiss, moved to
10 strike the Declaration of Jeffery Ganson. Dkt. 9 at 24. The Plaintiffs objected to Mr. Ganson
11 indicating a typo in an email exchange with counsel for the parents because it was not in support
12 of the Defendant's motion to dismiss as required by CR 7(b)(1). *Id.* Mr. Ganson's declaration
13 may be seen as supporting Defendant's pleadings because it clarifies the record. Therefore, the
14 Plaintiffs' motion to strike should be denied.

15 For the foregoing reasons, Defendant's motion for summary judgment should be granted
16 and the Plaintiffs' cross-motion for summary judgment should be denied.

17 Therefore, it is hereby **ORDERED** that

18 (1) the Defendant's motion for summary judgment (Dkt. 8, 13) is GRANTED;

19 (2) the Plaintiffs' cross-motion for summary judgment (Dkt. 15) is DENIED;

20 (3) the Plaintiffs' motion to strike (Dkt. 9) is DENIED; and

21 (4) this case is DISMISSED.

22 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
23 to any party appearing *pro se* at said party's last known address.

24 DATED this 22nd day of January, 2009.

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26 
27 ROBERT J. BRYAN
28 United States District Judge